

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-1109

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

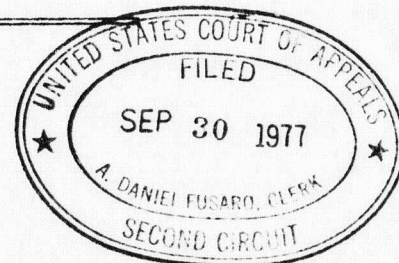
-against-

RAYMOND RICARD,

Appellant.
-----X

B
P165
Docket No. 77-1109

PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

-against-

RAYMOND RICARD,
Appellant.

Docket No. 77-1109

PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC

Appellant Raymond Ricard seeks rehearing with a suggestion for rehearing en banc, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, from a judgment of a panel of this Court (Smith and Oakes, C.JJ., and Carter, D.J.)* dated September 16, 1977. The judgment affirmed a judgment of conviction rendered by the United States District Court for the Southern District of New York (Griesa, D.J.) for possession of stolen mail in violation of 18 U.S.C. §1708.

The principal issue raised on this appeal is whether the

*A copy of this Court's opinion is annexed hereto as A.

superseding indictment covering the same conduct as the petty offense originally charged posed a realistic likelihood of vindictiveness for appellant's decision to proceed to trial rather than plead guilty and, therefore, contravened the due process clause.

On August 19, 1976, an information* was filed charging appellant with the petty offense of obstruction of mail on the ground that on March 13, 1976, he had taken two books of money orders from the mail.

On December 14, 1976, more than two months after the suppression hearing, a superseding indictment** was filed (S76 Cr. 776) charging appellant with the felony of unlawful possession of the two books of money orders knowing that they had been stolen from the mail (18 U.S.C. §1708). The petty offense of obstruction of mail, which had been charged in the information, was included as the second count of the indictment. At a pretrial conference on the following day, Assistant United States Attorney Parver explained the circumstances under which the indictment was obtained:

I do know I spoke with Mr. Curley [defense counsel] about a week ago and asked whether his defendant was prepared to go to trial and Mr. Curley said yes, and I said in that case I am informing you that the government is bringing a super-

*The information is annexed as B.

**The indictment is annexed as C.

seding indictment.

[A3]*

Though the speedy trial period was drawing to a close and the trial was scheduled for the following week, the prosecutor argued that the late indictment would not prejudice the defense because

...the pattern underlying the two different counts is essentially the same so that it isn't a question of introducing any more evidence in the trial or surprising the defendant with any kind of other transaction.

[A13]

Defense counsel, who had just been handed a copy of the indictment, noted that "it is basically the same charge, elevated from a petty offense to a felony..." [A6] and objected to the added count "as a potential penalty...for defendant's exercising his right to trial" [A7].

On December 20th, at a pretrial conference, counsel announced that he had drafted a motion and memorandum of law to dismiss the felony count on the ground of government vindictiveness [B5-6]. The prosecutor again stated that "the indictment and the information were both drafted under the belief that the government would be able to prove that he [appellant] took these things from the mail" [B10]. Then, the government suddenly changed theories and asserted that the real reason for the change in the charge was that Assistant United States Attor-

*"A" and "B" refer to the minutes of December 15 and 20, 1976, respectively.

ney Lawler had just discovered over the weekend that appellant could not have taken the money orders from the mail himself but must have obtained them from someone else [B8-11]. The prosecutor moved to dismiss the obstruction of the mail charge and to proceed solely upon the felony count [B9].

On the following day, Judge Griesa denied the written motion to dismiss the indictment, concluding that the prosecution had taken the "reasonable precaution" of including "in the indictment two types of theories, one possession, and one obstruction" [T59].

At the close of the non-jury trial, the court found appellant guilty of possession of money orders stolen from the mail and dismissed the lesser count of obstruction of the mail.

On September 16, 1977, this Court affirmed the judgment of conviction in an opinion which found no due process violation, "given the lack of any substantial evidence of vindictiveness on the part of the prosecution..."

ARGUMENT

THE COURT'S DECISION REVEALS A MIS- APPREHENSION OF THE PRINCIPLE OF PEARCE AND BLACKLEDGE.

Two months after the suppression hearing and shortly before the end of the speedy trial period, the Assistant United States Attorney called the defense attorney and inquired "whether his defendant was prepared to go to trial." When counsel answered "Yes," the prosecutor said, "in that case I am informing you that the government is bringing a superseding indictment" [A3]. The prosecutors at both pretrial conferences admitted that the felony charge in the indictment was based upon the identical acts and the same theory of the case as the petty offense charged earlier in the information [A13, B10]. On appeal, appellant argued that under these circumstances, the increase in the charge from a petty offense to a felony created "a realistic likelihood of [prosecutorial] vindictiveness" (Blackledge v. Perry, 417 U.S. 21, 27 (1974)) that deprived appellant of due process of law as guaranteed by the Fifth Amendment. This court's opinion reveals a basic misunderstanding of the principle of Blackledge and North Carolina v. Pearce, 395 U.S. 711 (1969).

Pearce and Blackledge create a "prophylactic rule" (Blackledge, supra, 417 U.S. at 26) designed to ensure that a defendant may exercise his rights without the fear of retaliatory motivation on the part of prosecutors or sentencing judges. Id. at 725. "Apprehension of vindictiveness and 'the appearance

of vindictiveness' (United States v. Ruesga-Martinez (9th Cir. 1976) 534 F.2d 1367, 1369) are adequate to bring [the] case squarely within Blackledge." United States v. De Marco, 550 F.2d 1224, 1227 (9th Cir. 1977).

This Court now emasculates that principle by stating that

...even if the circumstances of this case arguably pose a realistic likelihood of the apprehension of prosecutorial vindictiveness and bring into play the principles of Pearce and Blackledge, this by no means mandates reversal. Unlike Blackledge, in this case the prosecutor was able to justify the increase in charges brought against appellant. Another attorney had originally handled the case and filed the information charging a misdemeanor. The case was later assigned to her, and when she reviewed the file several weeks before the trial date, she realized that the facts warranted adding a felony charge.

This is an incorrect statement of the law. The accused does not bear the burden of producing "substantial evidence of vindictiveness." Slip op. at 6020. Indeed, he does not have to introduce any evidence that the prosecutor acted maliciously or in bad faith in obtaining the indictment. Blackledge, supra, at 28. It is "the prosecution [that] bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive." United States v. Ruesga-Martinez, supra, 534 F.2d at 1369. The court's finding that the prosecutor in the instant case was able to justify the increase in the charge by reviewing the original file of

the case* fails to take into account the Pearce requirement that the government must point to "objective information concerning identifiable conduct on the part of the defendant..." Pearce, supra, 395 U.S. at 726. Other courts have not hesitated to reject the proffered excuse of information that had been known to the prosecution before it instituted the original charge or the handling of the matter in the first instance by an inexperienced prosecutor. United States v. Ruesga-Martinez, supra, 534 F.2d at 1370; United States v. Gerard, 491 F.2d 1300, 1306 (9th Cir. 1974); see United States v. Jamison, 505 F.2d 407, 416-417 (D.C. Cir. 1974). Even the discovery of new evidence has been deemed an inadequate justification for the higher charge in the absence of a showing that this evidence was so "significant [and] unforeseeable as to counter the distinct appearance of vindictiveness..." United States v. Lippi, ____ F. Supp. ____ (D.N.J. August 1, 1977) (21 Cr.L.Rptr. 2459, 2460). The court's decision not only contravenes the Pearce-Blackledge doctrine as it has been applied by other courts, but contradicts this Circuit's prior decisions on the subject. See United States v. Mallah, 503 F.2d 971, 988 (2d Cir. 1974); United States ex rel. Williams v. McMann, 436 F.2d 103, 105 (2d Cir. 1970), cert.

*The court notes that adding the felony charge was "a reasonable step for the prosecutor to take" in view of the facts adduced at trial. However, the record is clear that the prosecution did not learn that it could not prove the lesser count until after the filing of the superseding indictment.

denied, 402 U.S. 914 (1971).

The decision in the instant case misapprehends both the controlling precedents as well as the immediate consequences. Following Ricard, prosecutors who are under the constraints of the speedy trial rule may be expected to bludgeon defendants into pleading guilty by threatening to raise the charges on the eve of trial. All the government need do to circumvent the rule of Blackledge is to transfer the case from one prosecutor to another.

Conclusion

For the foregoing reasons, rehearing or rehearing en banc should be granted.

Respectfully submitted,

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BARRY BASSIS,
Of Counsel.

September 30, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1287—September Term, 1976.

(Argued June 13, 1977 Decided September 16, 1977.)

Docket No. 77-1109

UNITED STATES OF AMERICA,

Appellee,

—against—

RAYMOND RICARD,

Appellant.

Before:

SMITH and OAKES, *Circuit Judges*, and
CARTER, *District Judge*.*

Appeal from a judgment of conviction for violation of 18 U.S.C. §1708, after a bench trial in the United States District Court for the Southern District of New York, Thomas P. Griesa, *Judge*, on the grounds that appellant's Fourth and Fifth Amendment rights had been violated.
Affirmed.

WILLIAM J. GALLAGHER, Esq., New York, N.Y.
(The Legal Aid Society, Federal Defender
Services Unit, New York, N.Y., Barry Bas-
sis, Esq. of counsel), *for Appellant*.

* Of the United States District Court for the Southern District of New York, sitting by designation.

A

RICHARD F. LAWLER, Assistant United States Attorney, New York, New York (Robert B. Fiske, Jr., United States Attorney for the Southern District, Frederick T. Davis, Assistant United States Attorney, New York, N.Y., of counsel), *for Appellee.*

CARTER, *District Judge:*

Appellant, Raymond Ernest Ricard, is appealing his conviction and sentence for violation of 18 U.S.C. § 1708 on the basis of alleged violations of appellant's due process and search and seizure rights.

On August 19, 1976, an information was filed (76 Cr. 776) charging appellant with taking two books of money orders from the mail in violation of 18 U.S.C. § 1701. If convicted on such a charge Ricard could have been sentenced to a maximum of a \$100 fine or six months imprisonment or both. On October 5 and 6, 1976, before Judge Griesa of the Southern District of New York, a hearing was held on Ricard's motion to suppress certain physical evidence. Judge Griesa denied the motion. On December 14, 1976, the government filed a superseding indictment (S 76 Cr. 766). Count Two of this indictment repeated the charge that Ricard had violated 18 U.S.C. § 1701. Count One of the indictment added the charge that appellant had unlawfully possessed two books of money orders, knowing them to have been stolen. 18 U.S.C. § 1708. Conviction on this count carried a possible maximum sentence of a \$2,000 fine or five years imprisonment or both. Trial on the indictment took place on December 21, 1976, before Judge Griesa without a jury. At the conclusion of the trial Judge Griesa found appellant guilty of Count One. Count Two was dismissed, no evidence on it having

been introduced by the Government. On February 23, 1977, Judge Griesa sentenced appellant to a two year term of imprisonment, six months to be served in jail and the remainder suspended with the appellant placed on probation. Execution of the sentence was stayed pending resolution of this appeal.

I

The superseding indictment, which was stated previously included the more serious charge under 18 U.S.C. § 1708, was filed by the government subsequent to a conversation between the Assistant United States Attorney then handling the case (Ms. Parver) and appellant's attorney, the relevant substance of which was detailed by the prosecutor at the December 15, 1976 pre-trial conference before Judge Griesa. She stated:

"I do know I spoke with Mr. Curley [defense counsel] about a week ago and asked whether his defendant was prepared to go to trial and Mr. Curley said yes, and I said in that case I am informing you that the government is bringing a superseding indictment." Minutes of December 15, 1976 pre-trial conference, at 3.

Ms. Parver told the court and counsel that another assistant had been responsible for filing the original information, and that after she had reviewed the file she had determined that a charge of possessing stolen mail was warranted. Minutes, December 15, 1976 pre-trial conference, at 6, 7. At this conference, defense counsel objected to the addition of the possession count on the ground that it was a "potential penalty . . . for defendant's exercise of his right to trial." *Id.*, at 7. Judge Griesa later denied appellant's formal motion to dismiss the felony count.

Relying primarily on *North Carolina v. Pearce*, 395 U.S. 711 (1969) and *Blackledge v. Perry*, 417 U.S. 21 (1974).

appellant contends that this was error. He argues that inclusion of the possession count in the superseding indictment "posed a realistic likelihood of 'vindictiveness' for appellant's decision to proceed to trial," Appellant's brief at 9, and that his due process rights were thereby violated. This claim is insubstantial.

In *North Carolina v. Pearce*, *supra*, the Supreme Court confronted the issue of whether a trial court could impose a more severe sentence upon retrial and reconviction after a defendant has successfully appealed his original conviction. The Court held that while this was not absolutely prohibited, due process

"requires that vindictiveness against a defendant for having successfully attacked his conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." 395 U.S. at 725.

To assure the absence of such motivation, the Court held that if a more severe sentence is imposed after reconviction, the sentencing court must state on the record the reasons calling for the sentence.

The rule in *Pearce* was later extended to prevent the possibility of prosecutorial vindictiveness from deterring a defendant's exercise of his procedural rights. *Blackledge v. Perry*, *supra*. In *Blackledge*, the defendant Perry had been initially charged with a misdemeanor assault with a deadly weapon. Perry was convicted of this charge after trial by a lower North Carolina court and was sentenced to six months imprisonment. Under North Carolina law,

Perry had the right to a trial *de novo* in a higher court, which right he exercised. Prior to trial, however, the prosecution secured an indictment which charged him with the felony of assault with intent to kill, even though the indictment covered the same facts which had formed the basis of the original misdemeanor charge. Perry entered a plea of guilty to the indictment, a result of which was that Perry received a stiffer sentence than originally. The Supreme Court, applying the general principles of *Pearce*, held that the prosecution had overstepped the bounds of due process when it obtained the felony indictment.

"A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting himself to a significantly increased potential period of incarceration. . . . We hold, therefore, that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory rights to appeal by bringing a more serious charge against him prior to the trial *de novo*." 417 U.S. at 28-29.

As appellant points out with understandable vigor, the Court's decision did not turn on any finding of prosecutorial vindictiveness. Like *Pearce*, *Blackledge* was bottomed on the concern that a defendant not be deterred from exercising his constitutional or statutory rights by the apprehension of retaliatory action by the prosecution. *Id.*, at 28.

Appellant argues that the prosecutor's action in filing the superseding indictment created the apprehension of vindictiveness, and that accordingly *Pearce* and *Blackledge* require reversal of his conviction, despite the absence of any proof of a vindictive motive. However, even if the

circumstances of this case arguably pose a realistic likelihood of the apprehension of prosecutorial vindictiveness and bring into play the principles of *Pearce* and *Blackledge*, this by no means mandates reversal. Unlike *Blackledge*, in this case the prosecutor was able to justify the increase in charges brought against appellant. Another attorney had originally handled the case and filed the information charging a misdemeanor. The case was later assigned to her, and when she reviewed the file several weeks before the trial date, she realized that the facts warranted adding a felony charge. As Judge Griesa held, and as the facts adduced at trial showed, this was a reasonable step for the prosecutor to take.¹ Trial transcript at 59-60. Moreover, there is no evidence of any plea bargaining in progress between the defendant and the prosecution to warrant a conclusion that the defendant's decision to go to trial rather than plead triggered the superseding indictment. On the contrary, the conversation between the defendant's counsel and the prosecution as to whether the defendant was going to trial was merely a request for information by the prosecution to determine whether she need undertake the task of drafting and filing the superseding indictment which she had already concluded was necessary if there was to be a trial.² Certainly, given the lack of any substantial evidence of vindictiveness on the part of the prosecution, the increase in the charges brought against appellant cannot be said to trench upon defendant's due process rights.

1 As it turned out, in fact, the original charge of obstruction of the mails could not have been sustained at trial, since the money orders were delivered through a post office station where appellant would not have had access to them.

2 A question is raised whether under the facts of this case the likelihood of prosecutorial vindictiveness is sufficiently real even to fall under the principle of *Blackledge*. For the purposes of this opinion we have assumed that it does.

II

At the suppression hearing of October 5-6, 1976, appellant testified on direct examination that he had been traveling on the New Jersey Turnpike when stopped for speeding by a state trooper. After checking his license, the trooper ordered appellant out of the car, and, in the course of a frisk, discovered a tin foil packet containing cocaine. Appellant testified that the stolen money orders were also in this pocket, but they were not discovered until he was searched at police headquarters. The testimony of Santiago Negron, the passenger, was consistent with this story.

The government then called Thomas Kelleher, the policeman who had stopped appellant's car. Kelleher testified that he observed appellant travelling at 75 miles per hour in a 55 miles per hour zone and stopped him for speeding. At Kelleher's direction appellant and his passenger got out of the car. Appellant produced his license and registration, and asked for leniency because he was a postal worker. Thereupon, as appellant reached into his jacket pocket for some identification, Kelleher observed a tin foil packet. Kelleher asked appellant what was in the packet, and appellant replied "Nothing." Nevertheless, suspicious that the packet contained drugs, Kelleher removed it from appellant's pocket. Finding in it a white powder (later identified as cocaine), Kelleher arrested appellant and brought him to the station house. It was not until then that the money orders were discovered.

Judge Griesa denied the motion to suppress, choosing to credit Kelleher's version of the facts and to reject appellant's. The issue before the court, therefore, is whether given the facts found by Judge Griesa, there was sufficient

cause for officer Kelleher to seize the packet containing cocaine.³ We hold that there was.

Under New Jersey law, officer Kelleher was entitled to arrest appellant for travelling 75 m.p.h. in a 55 m.p.h. zone. N.J.S.A. 39:5-25; *State v. Padavano*, 81 N.J. Super 321, 195 A.2d 429 (1963). Had the officer arrested appellant, he would therefore have been fully entitled to search him, even though the arrest was based on a simple traffic violation. *United States v. Robinson*, 414 U.S. 218 (1973); see also *Gustafson v. Edwards*, 414 U.S. 260 (1973); *United States v. Edwards*, 415 U.S. 800 (1974). This case, of course, differs from *Robinson* in that officer Kelleher chose not to arrest appellant for the speeding violation, and the contested search was actually the cause of appellant's arrest. Nevertheless, the fact that Kelleher had cause to arrest appellant for speeding, even if he initially determined not to do so, was a sufficient predicate for a full search. *United States v. Jenkins*, 496 F.2d 57, 72-73 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975); *United States v. Riggs*, 474 F.2d 699, 702 (2d Cir.), cert. denied, 414 U.S. 820 (1973). As Judge Mansfield stated in *Jenkins*,

"The mere fact that the trooper reversed the procedure, conducting the search before the arrest, did not render it illegal as long as probable cause to arrest existed at the time of the search.

3 Although appellant was convicted for possessing stolen mail, he has raised no direct challenge to the station house search which led to the discovery of the mail, since there can be no dispute that if officer Kelleher's seizure of the cocaine was lawful, he was entitled to arrest appellant and subsequently search him. *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Edwards*, 415 U.S. 800 (1974).

... Any other holding would, without rational basis,
exalt form over substance."

496 F.2d at 73 [citations omitted]. Officer Kelleher's search
of appellant, therefore, was constitutionally justified.

The conviction below is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :
- v - : INFORMATION
RAYMOND ERNEST RICARD, : 76 Cr.
Defendant. :

The United States Attorney charges:

On or about the 13th day of March, 1976,
in the Southern District of New York, RAYMOND ERNEST RICARD,
the defendant, did unlawfully, wilfully and knowingly
obstruct and retard the passage of the mail by taking
from the United States mail, two books of American Express
money orders, to wit, money orders numbered 45-421-980-521
to 45-421-980-559, said money orders being addressed to:

Ray Drugs
4061 Broadway
New York, New York 10032.

(Title 18, United States Code, Section 1701.)

ROBERT B. FISKE, JR.
United States Attorney

JP:wp
12-600

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(S) 76 CR 77

UNITED STATES OF AMERICA

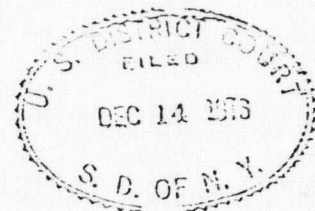
INDICTMENT

S 76 Cr.

- v -

RAYMOND ERNEST RICARD,

Defendant.



COUNT ONE

The Grand Jury charges:

On or about the 13th day of March, 1976, in the Southern District of New York, RAYMOND ERNEST RICARD, the defendant, did unlawfully, wilfully and knowingly have in his possession two books of American Express money orders numbered 45-421-980-521 through 45-421-930-559, said money orders being addressed to:

Ray Drugs
4061 Broadway
New York, New York 10032

which had been stolen, taken, embezzled and abstracted from and out of an authorized depository for mail, knowing the same to have been stolen, taken, embezzled and abstracted.

(Title 18, United States Code, Section 1703.)

COUNT TWO

The Grand Jury further charges:

On or about the 13th day of March, 1976, in the Southern District of New York, RAYMOND ERNEST RICARD, the defendant, did unlawfully, wilfully and knowingly obstruct and retard the passage of the mail by taking from the United States mail, two books of American Express money orders, to wit, money orders numbered 45-421-980-521 to 45-421-980-559, said money orders being addressed to:

Ray Drugs
4061 Broadway
New York, New York 10032.

(Title 18, United States Code, Section 1701.)

MICROFILM

DEC 14 1976

Donella H. Bennett
FOURMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

4

C

United States District Court
SOUTHERN DISTRICT OF NEW YORK
THE UNITED STATES OF AMERICA

vs.

JOHN J. BARTER, JR.,

Defendant.

INDICTMENT

675 Cr.

FILED IN CASE NO. 76 Cr. 776, 11/17/76
AND 11/18/76

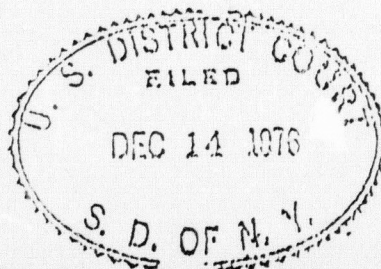
JOHN J. BARTER, JR.,

United States Attorney.

A TRUE BILL

Donella H. Bennett

Foreman.



GRIESA, J. as a relator and superseding
Indictment 76 Cr. 776 (GRIESA, J.).

Preceding J.

R

12-21-76

Def't Picard (att present) Trial began.

NOV - Jury only on count 1.

Count 2 is dismissed by the court.

Original Informant 76 Cr 776 is dismissed.

Def't. is found guilty on Count 1
by the court. Sentence set adj.

to Feb 9, 1977 9:30 AM. PSI ordered

Bail continued ROR

Kreiser J.

(RW)

Feb 23, 1977

Def't. (alt present) is sentenced to 2 years.
Pursuant to Sec. 3651, T. 18, USC, 6 months to be
served in a jail type institution, the remainder
of sentence is suspended and Def't. is placed on
Probation for 18 months to commence upon
end of confinement. Surrender is adj. pend
appeal - continued (OR.

Guesin, J.

J

CERTIFICATE OF SERVICE

September 30 , 1977

I certify that a copy of this petition for rehearing
has been mailed to the United States Attorney for the
Southern District of New York.

Barry Bassia